COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2015-SC-000144-D

MARY E. MCCANN, INDIVIDUALLY and ON BEHALF OF ALL OTHERS SIMILARLY SITUATED — APPELLANTS

V.

APPEAL FROM THE COURT OF APPEALS
CASE NO. 2014-CA-000392
JEFFERSON CIRCUIT COURT CASE NO. 10-CI-01130

THE SULLIVAN UNIVERSITY SYSTEM, INC. d/b/a SULLIVAN UNIVERSITY COLLEGE OF PHARMACY et al. — APPELLEES

BRIEF FOR APPELLANT MARY E. MCCANN

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed via U. S. Mail, postage prepaid, this 19th day of January 2016 to: Grover C. Potts, Jr., Michelle DeAnn Wyrick, Emily C. Lamb, Wyatt, Tarrant & Combs, Suite 2800, 500 West Jefferson Street, Louisville, KY 40202, Counsel for Appellees; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and Honorable Olu A. Stevens, Judge, Jefferson Circuit Court, Division Six, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202. The undersigned further certifies that Appellant has not withdrawn the record on appeal.

Theodore W. Walton

INTRODUCTION

This case presents a discreet issue of statutory interpretation with far-reaching implications for class action lawsuits in Kentucky courts. Employees have brought wage claims in class form in Kentucky for over a century, including claims for violations of KRS §337 since this Court's 2005 decision in *Parts Depot, Inc. v. Beiswenger*. Until *Toyota Motor Mfg., Ky. v. Kelley*, it was never suggested KRS § 337.385 intended to preclude class action litigation of wage and hour claims. Dicta in *Kelley* and the Court of Appeals' holding in this case resulted in a raft of motions to dismiss and created substantial uncertainty concerning the procedural vehicles available to victims of wage theft. The Court of Appeals' holding does not comport with a plain reading of the statute, ignores the analyses of the United States Supreme Court regarding the same issue in *Califano v. Yamasaki*, and works in contravention to the policies expressed in the Kentucky Wage and Hour Act ("KWHA").

STATEMENT CONCERNING ORAL ARGUMENT

This Appellant believes that oral argument would assist this Court in its consideration of this case. The Court's decision will have profound effects on employment law and the viability of class claims in Kentucky. Appellant submits that these broad policy implications merit discussion.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. FACTUAL AND PROCEDURAL HISTORY

This claim arises out of the employment relationship between Appellant Mary E. McCann ("McCann") and Appellee The Sullivan University System, Inc. ("Sullivan"). McCann worked as an "Admissions Officer" for Sullivan from March 2006 to April 3, 2008. Sullivan designated McCann, and all other Admissions Officers, as "exempt" from overtime laws in order to avoid paying overtime wages and other benefits.

On February 18, 2010, McCann brought an action in Jefferson Circuit Court for violations of Kentucky's Wage and Hour Act, KRS § 337.010 *et seq.*, and a collective action for violations of The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* Through a parallel investigation, the United States Department of Labor ("USDOL") concluded that Sullivan was improperly classifying Admissions Officers as exempt employees under the FLSA. Subsequent to McCann's suit, the USDOL then filed its own case against Sullivan in U.S. District Court for the Western District of Kentucky. *Solis v. The Sullivan University System, Inc.*, et. al., Civil Action No. 3:10-CV-133-S, United States District Court Western District of Kentucky. The Department of Labor eventually resolved the federal claims, leaving McCann free to prosecute the state law claims in the Jefferson Circuit Court.[1]

[1] As discussed below, Kentucky's wage and hour provisions differ from their federal counterparts in several important ways. Our legislature has provided a statutory remedy to any employee whose employer has failed to pay "any part of the wage agreed upon." The FLSA's pay provisions are far narrower. Also, of particular import in this case, Kentucky's statute of limitations for bringing a wage claim is significantly longer than the corresponding federal limitations period.

McCann moved to certify a class action on October 24, 2013. The issue was fully briefed, and on February 27, 2014, the Jefferson Circuit Court ("Circuit Court") rendered its order denying class certification. Relying heavily on dicta in the unpublished Court of Appeals case, *Toyota Motor Mfg., Ky. v. Kelley,* 2013 Ky. App. Unpub. LEXIS 910 (Ky. Ct. App. Nov. 15, 2013), Judge Stevens found that KRS § 337.385 prohibited the use of class actions as a mechanism for workers to collectively obtain relief for wage violations. In *Kelley,* the issue of class action relief under KRS § 337.385 was unnecessary to the resolution of the Appeal. However, the Court of Appeals offered that if they were to reach the issue they would hold that KRS § 337.385 "does not permit class actions." *Id.* at 25. In February, the Court of Appeals issued its opinion in this case, closely following the *dicta* in *Kelley*. The Court of Appeals procrustean reading of the statute to prohibit class actions is out of step with the Wage and Hour Act's language and purpose. The statutory arguments made by Sullivan and accepted by the Court of Appeals echo arguments that were made in class action cases over three decades ago and roundly rejected.

II. RELEVANT CONSTITUTIONAL AND STATUTORY FRAMEWORK

A. The FLSA Creates A Specialized "Collective Action" Framework Distinct from Fed. R. Civ. P. 23

The FLSA was enacted as part of President Roosevelt's New Deal in 1938. See *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294 (S.D.N.Y. 2011), citing John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 Law & Contemp. Probs. 464, 466 (1939). When the FLSA legislation and its collective action provision were first introduced, there were no Federal Rules of Civil Procedure. It took over a year from

introduction for the FLSA to become law. *Id.* In the intervening months, the first version of the Federal Rules of Procedure were enacted. Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1004 at 31 (3rd ed. 2002). The original version of Rule 23 was a far cry from our modern class action rule. Classes were defined in terms of rigid property-law relationships among members, and were ill suited to wage litigation.

Since the 1947 Portal-to-Portal Act, the FLSA has prohibited the use of class actions in FLSA cases. *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 173 (U.S. 1989). In place of class actions, the FLSA contains its own group litigation mechanism, known as a "collective action." The FLSA's "collective action" procedure is found in 29 U.S.C. § 216(b). The section reads, in part:

> (b) Damages; right of action; attorney's fees and costs; termination of right of action, [] . . . An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves **and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. . .**
>
> **(emphasis added)**

The highlighted language above both prohibits class actions and creates the FLSA's alternative group litigation method, the collective action. Federal Courts have long held that Rule 23 and § 216(b) actions are "mutually exclusive and irreconcilable". *LaChapelle v. Owens Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975).[2] "Rule 23 actions

[2] A few isolated cases read some Rule 23 requirements into Section 216(b) thereby conflated collective actions with Rule 23 class actions. e.g., *Shushan v. Univ. of Colo. at*

are fundamentally different from collective actions under the FLSA" Section 216(b). *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (U.S. 2013).

The differences between FLSA collective actions and Rule 23 class actions are significant. Professors Wright and Miller, in their definitive treatise on Federal Practice and Procedure, observe that "collective actions under the [FLSA] are a unique species of group litigation." Charles Alan Wright et al., *Federal Practice and Procedure* § 1807 (2005). Under collective actions, "similarly situated" employees must "opt-in" to benefit or be bound by the outcome of the litigation. In contrast, under Federal Rule 23, class members must "opt-out" to avoid being bound. In a class action brought under Rule 23, the filing of the complaint tolls the running of the statute of limitations for all members of the proposed class. In contrast, collective actions do not toll absent employees' limitations period. Rather, the statute is measured by the date each employee opts-in.

Furthermore, Rule 23's rigorous predominance requirement does not apply to 216(b) cases, as it "undermines the remedial purpose of the collective action device." *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 585-586 (6th Cir. Ohio 2009); *Frye v. Baptist Mem. Hosp., Inc.*, 495 Fed. Appx. 669, 672 (6th Cir. Tenn. 2012). Similarly, the familiar class action prerequisites of numerosity, commonality, typicality, and adequacy are not part of a § 216(b) certification analysis. *D'Anna v. M/A-COM, Inc.*, 903 F. Supp. 889, 892 n.2 (D. Md. 1995); *see also, e.g., Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n. 12 (11th Cir. Ga. 1996) ("[I]t is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class actions under

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Boulder, 132 F.R.D. 263 (D. Colo. 1990). The Supreme Court's *Genesis* decision has been read as the death of the *Shushan* line of cases. *Dyson v. Stuart Petroleum Testers, Inc.*, 308 F.R.D. 510, 512 (W.D. Tex. 2015)

that Rule 23"); See also, *LaChapelle* 513 F.2d at 289 (Rule 23 and § 216(b) actions are "mutually exclusive and irreconcilable"); *O'Brien* 575 F.3d at 585-586; *Frye* 495 Fed. Appx. at 672.

In the place of the rigorous certification tests of Rule 23, Federal Courts reviewing a proposed § 216(b) collective action determine if the group of employees is "similarly situated". Neither the FLSA, the Supreme Court, nor the Sixth Circuit has defined the term "similarly situated". *O'Brien* 575 F.3d at 584; *Seger v. BRG Realty, LLC*, 2011 U.S. Dist. LEXIS 56117 (S.D. Ohio May 24, 2011). However, it is clear the term "similarly situated" is a test of community of interest unique to the FLSA (and acts such as the Age Discrimination in Employment Act, 29 U.S.C.S. § 626(b), which adopted the FLSA collective action procedure). "Similarly situated" is not a term included in Kentucky Rule 23 or its federal counterpart.

B. Kentucky's Class Action Framework is Contained in CR 23.01 *et. seq.*

The Kentucky Constitution provides that "the Supreme Court shall have the power to prescribe . . . rules of practice and procedure for the Court of Justice." Ky. Const. § 116.[3] The current form of the Kentucky Rules of Civil Procedure was created pursuant to this delegation of power and hold, "These rules govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules." CR 1. Within the Kentucky Civil Rules of Procedure is CR 23. "An action may be maintained as a class action if the

[3] "[T]he Kentucky Constitution undeniably delegates exclusively to this Court the authority to adopt rules of practice and procedure for the Court of Justice and rules governing our appellate jurisdiction." *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 422 (Ky. 2005); *Smith v. Dixie Fuel Co.*, 900 S.W.2d 609, 612 (Ky. 1995).

prerequisites of Rule 23.01 are satisfied." CR 23.02. Those prerequisites are detailed in CR 23.01:

> Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

It is apparent from the construction and operation of these rules and constitutional provisions that CR 23 provides the procedures, requirements, and availability of class actions in all civil cases.

KRS § 337.385(2) reads in full:

> If, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he or she had reasonable grounds for believing that his or her act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section. Any agreement between such employee and the employer to work for less than the applicable wage rate shall be no defense to such action. Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves.

The simple question in this case is whether the language of KRS § 337.385(2) prohibits the use of CR 23 class actions under the Wage and Hour Act.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS INCOMPATABLE WITH KENTUCKY'S HISTORICAL RECOGNITION OF THE CLASS ACTION VEHICLE AS AN APPROPRIATE TOOL FOR RESOLVING WAGE DISPUTES

Wage cases have been brought in class form in Kentucky for over a century. *See*

Bridges v. F. H. McGraw & Co., 302 S.W.2d 109, 113-14 (Ky. 1957) (holding that justiciable interests by employees to receive their unpaid wages merited a class action to determine "the extent of having the court construe the bargaining agreement, . . . to declare the rights of the employer and employees generally in respect to recovery or non-recovery, and to require disclosure to the extent the court in its reasonable discretion deems right and proper."); *Gorley, et al. v. City of Louisville*, 65 S.W. 844, 847 (Ky. Ct. App. 1901) (allowing a class action, preceding the enactment of the Kentucky Wage and Hour Act ("KWHA") legislation, by city police officers seeking unpaid wages owed by the city employer). In fact, this Court has resolved KRS 337 claims on a class-wide basis, precluding individual employees from re-litigating class claims. *Louisville v. Gnagie*, 716 S.W.2d 236 (Ky. 1986). Until the *Kelley* dicta, Kentucky courts never questioned whether KRS § 337.385 claims can be brought as a class through CR 23.[4] If

[4] *See Hughes v. UPS Supply Chain Solutions, Inc.*, 2013 Ky. App. Unpub. LEXIS 734 (Ky. Ct. App. Sept. 6, 2013) (KRS 337 class certified on remand pursuant to Court of Appeals mandate); see also, *Hughes v. UPS Supply Chain Solutions, Inc.*, 815 F. Supp. 2d 993 (W.D. Ky. 2011) (granting Plaintiff KRS 337 class' motion for remand); *Finney v. Free Enter. Sys.*, 2009 U.S. Dist. LEXIS 31215 (W.D. Ky. Apr. 11, 2009) (conditionally granting court-supervised notice to the putative class for Plaintiffs' Fair Labor Standards Act and Kentucky Wages and Hours Act claims); See also, *Whitlock v. FSL Mgmt., LLC*, 2012 U.S. Dist. LEXIS 112859 (W.D. Ky. Aug. 10, 2012) (granting certification) and *Whitlock v. FSL Mgmt., LLC*, 2015 U.S. Dist. LEXIS 170516 (W.D. Ky. Dec. 21, 2015) (enforcing settlement and denying motion to decertify based on Court of Appeals decision in this case); *Orms v. City of Louisville*, 686 S.W.2d 464, 465 (Ky. App. 1984) (granting summary judgment for the City of Louisville on other grounds); *Eng. v. Adv. Stores Co. Inc.*, 263 F.R.D. 423 (W.D. Ky. 2009) (denying Plaintiff class certification for lack of predominance); *Hasken v. City of Louisville*, 213 F.R.D. 280, 284 (W.D. Ky. 2003); *Barker v. Family Dollar, Inc.*, 2012 U.S. Dist. LEXIS 153331 (W.D. Ky. Oct. 25, 2012) (dismissing on other grounds); *McCauley v. Family Dollar, Inc.*, 2010 U.S. Dist. LEXIS 82243 (W.D. Ky. Aug. 11, 2010); *Oetinger v. First Residential Mortg. Network, Inc.*, 2009 U.S. Dist. LEXIS 61877 (W.D. Ky. July 15, 2009) (denying class certification for Fair Labor Standards Act and Kentucky Wages and Hours Act claims on other grounds); *Crawford v. Lexington-Fayette Urban County Gov't*, 2007 U.S. Dist.

the Court of Appeals' decision is allowed to stand, it will eliminate a critically important vehicle long been recognized in Kentucky for enabling groups of employees with small wage claims to obtain redress in the Commonwealth's courts.

II. THE FLSA'S PROHIBITION ON RULE 23 CLASS ACTIONS IS NOT FOUND IN THE KENTUCKY WAGE AND HOUR ACT

KRS § 337.385(2) does not contain any prohibition or mention of class actions. In the absence of prohibitive language, the Court of Appeals read a class action exclusion into the statute. Focusing solely on the final sentence of KRS § 337.385(2), the Court of Appeals reasoned that because the legislature failed to include language specifically authorizing representative capacity suits, class action lawsuits were unavailable. The last sentence of KRS § 337.385(2) only clarifies that employees may bring an action in the trial courts without relying on the Secretary of Labor (formerly Commissioner) bringing an action on their behalf. Clarifying that the power to bring claims lies with the employee does not suggest that the legislatures also intended to depart from the general applicability of the Rules of Civil Procedure.

The Court of Appeals placed significant emphasis on the fact that the FLSA includes language specifically authorizing representative capacity suits and the KWHA does not. The "sharp contrast" between the language in the FLSA and KRS § 337.385 does not suggest that class actions are unavailable under the KWHA; in fact, on closer reading, it suggests the opposite.

The Kentucky legislature borrowed portions of the language in KRS §337.385 from §216(b). The Court of Appeals, at Sullivan's invitation, read the failure to copy

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LEXIS 2567 (E.D. Ky. Jan. 9, 2007) (granting Defendants' motion to dismiss on other grounds).

§216(b)'s language regarding "similarly situated" employees as indicating a prohibition on class litigation. The difference in language, to the contrary, actually indicates the general assembly's intent to reject the FLSA's collective action method of adjudicating group litigation. By failing to include the FLSA's prohibition on class actions, the 1974 general assembly allowed its recently modernized Rule 23 to set the contours of group litigation in wage and hour disputes

With the 1947 Portal-to-Portal Act, Congress explicitly prohibited the use Rule 23 class actions in favor of its collective action procedure. Absent from KRS § 337.385 (2) is the FLSA provision prohibiting group litigation without written consent.

Had the legislature intended to prohibit Rule 23 class actions, it would have followed Congress's lead and included express language requiring affirmative joinder by all parties. Instead, the Kentucky legislature omitted *both* the FLSA prohibition on Rule 23 class actions *and* the language creating collective actions. The decision makes sense, in light of the developments in the area of group litigation between the initial enactment of the FLSA in 1938 and the 1974 revisions to the KWHA.

When the FLSA was proposed, the federal rules had yet to be adopted. The Federal Rule 23 that went into effect shortly thereafter was a far cry from the modern class action rule utilized today. The original 1938 Rule 23(a) was largely a procedural vehicle for disputes involving a common fund or a permissive joinder rule somewhat akin to a collective action. Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights By Misapplying Class Action Rules*, 61 Am. U.L. Rev. 523, 542-548 (2012). The modern federal class action rule enacted in 1966 became the predominant form of aggregate litigation. The main innovation of the 1966 amendments

to Rule 23 was the creation of a mechanism whereby all class members who do not affirmatively opt-out are bound by the judgment. *Amchem Prods. v. Windsor*, 521 U.S. 591, 614-615 (U.S. 1997). On July 1, 1969, Kentucky followed suit amending the Rules of Civil Procedure and incorporating the modern class action rules.

By 1974, when the KWHA was revised and KRS § 337.385(2) language was drafted, Kentucky already had a rule that established the general availability of class action relief to plaintiffs. Therefore, it is presumed the KWHA contemplated the availability of the already established provisions of CR 23. *Tilley v. Tilley*, 947 S.W. 2d 63 (Ky. App. 1997) (legislature is presumed to be aware of existing law when it enacts a statute).[5] Had the legislature meant to exclude wage claims from the general availability of class relief under the recently modernized Rule 23, it would have expressly said so. Instead, the legislature chose not to supplant the modern class action rule with an FLSA-like collective action procedure.

III. READING THE KWHA TO EXCLUDE GROUP RESOLUTION OF EMPLOYEE WAGE CLAIMS THWARTS THE INTENT OF THE KENTUCKY LEGISLATURE

A. Remedial Purpose of the KWHA

The Court of Appeals' restrictive interpretation of KRS § 337.385 runs afoul of the purpose of the KWHA and Rule 23. KRS § 446.080(1) states, "All statutes of this state shall be *liberally construed* with a view to promote their objects and carry out the

[5] Sullivan argued to the Court of Appeals that it was significant that eight years prior to the adoption of the KWHA the legislature included "similarly situated" language in the Kentucky Equal Pay Act ("KEPA"). When the KEPA was adopted in 1966 Kentucky was still operating under the antiquated Rule 23 that would not have allowed judgment to be binding on absent class members. The inclusion of the similarly situated language expresses an intent to go beyond the confining property law categories of Kentucky's pre-1969 rule 23.

intent of the legislature." (emphasis added). Pursuant to KRS § 446.080(1), when observing the KWHA as a whole, a specific object and intent of the General Assembly was to protect employees from predatory employers. One method to achieve this goal was to provide employees with easy and efficient access to the courts and counsel through class actions. Policy interests overwhelmingly support this view. Individual wage and hour claims tend to be for small monetary amounts. These small amounts work as a disincentive to meritorious suits by plaintiffs and their counsel because they do not see their individual claims as worthwhile in terms of the time and expense of litigation. Class actions correct this imbalance by grouping plaintiffs together and allowing them to share the resources necessary to gain the relief they lawfully deserve.

Prohibiting plaintiffs from aggregating their claims allows employers to cheat their employees out of rightfully earned wages and defeat the central purpose of the KWHA. *See Beattie v. CenturyTel, Inc.,* 511 F.3d 554, 567 (6th Cir. 2007) (finding that "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" (quoting *Amchem Prods* 521 U.S. at 617). As this Court has recognized, the KWHA attempts to incentivize employees and counsel to bring these claims to reduce the burden on the Secretary of Labor. *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 358-359 (Ky. 2005). Class action claims under KRS § 337.385 are particularly appropriate because they incorporate these policy concerns by consolidating plaintiffs who share the same common issues, bring the same questions of law, share the same factual backgrounds, et cetera. In addition, class actions "save the resources of both the courts and the parties by permitting an issue potentially affecting every . . .

beneficiary to be litigated in an economical fashion under Rule 23." *Califano,* 442 U.S. at 700-01; see also, *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982); *Newton v. Merrill Lynch. Pierce. Fenner & Smith. Inc.*, 259 F.3d 154, 192 (3d Cir. 2001) ("One of the paramount values in [class actions] is efficiency. Class certification enables courts to treat common claims together, obviating the need for repeated adjudications on the same issue").

This reading of KRS § 337.385 is bolstered by KRS § 337.395, which evidences the KWHA's overall purpose to protect employees by giving them the broadest protections available. This statute provides that:

> *Any standards* relating to minimum wages, maximum hours, overtime compensation, or other working conditions, in effect under any other law of this state *which are more favorable to employees* than standards applicable hereunder *shall not be deemed to be amended, rescinded or otherwise affected* by KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405, but shall continue in full force and effect until they are specifically superseded by standards more favorable to such employees by operation of or in accordance with KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405 or regulations issued thereunder. KRS § 337.395 (enacted 1974) (*emphasis added*).

One such favorable standard available is efficient resolution of wage and hour issues common to a group of employees through class actions.

In addition to allowing small employee claims to be efficiently litigated, the class action vehicle protects wage earners who enforce their protected rights from employer reprisals. The fear of employer retaliation is recognized as a "daunting obstacle" for employees to seek vindication of individual wage claims in courts or administrative agencies. *Twegbe v. Pharmaca Integrative Pharm., Inc.*, 2013 U.S. Dist. LEXIS 100067 (N.D. Cal. July 17, 2013) This is especially true with small claims. As one commentator has put it, "[o]ne does not have to be a legal scholar to know that suing the boss is not a

safe career move."[6] The chilling effect of employer reprisal has been recognized in a similar context by the United States Supreme Court, which stated, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (U.S. 1960). The class action vehicle provides cover for employees to vindicate these protected rights.[7] Absent the availability of group action, it is likely the Kentucky legislatures objectives in passing the KWHA would be thwarted.

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[6] Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 Minn. L. Rev. 1317, 1328 (2008). See also, But most employees are at-will and may be fired for any number of reasons, thereby making it harder still to recognize and prevent retaliation. Charlotte S. Alexander, Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act, 80 Miss. L.J. 443, 473 (2010) ("The situation may be even worse for those potential FLSA plaintiffs who are undocumented or who hold temporary employment visas issued in the name of their employer. For these workers, the potential cost of suing is not only the loss of a job and the associated income, but loss of their legal status in and removal from the United States." (footnotes omitted)); Andrew C. Brunsden, Hybrid Class Actions, Dual Certification and Wage Law Enforcement in the Federal Courts, 29 Berkeley J. Emp. & Lab. L. 269, at 296-97 (2008) ("Workers are thus confronted with a reasonable fear that exercising their rights may subject them to employer retaliation, notwithstanding statutory prohibitions against retaliation for rights enforcement. Termination, loss of benefits, or other employer reprisals raise the costs of participation in legal action, especially when those consequences threaten a worker's livelihood and family security. The fear that by taking action one may lose their job, suffer other adverse treatment, or hurt their reputation in the workplace, is a powerful incentive for inertia."

[7] *Rutti v. Lojack Corp.*, 2012 U.S. Dist. LEXIS 107677 (C.D. Cal. July 31, 2012); *Twegbe*, 2013 U.S. Dist. LEXIS 100067; *O'brien v. Encotech Constr. Servs., Inc.*, 203 F.R.D. 346, 351 (N.D. Ill 2011); *Mullen v, Treasure Chest Casino, LLC* 186 F.3d 620 (5ht Cir 1999); *Greko v. Diesel U.S.A., Inc.*, 277 F.R.D. 419, 425 (N.D. Cal. 2011); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 147 (6th Cir. 1977) [18] (holding that a former employee "is as much in need of the § 15 shield from retaliation as workers still on the job or workers who have been discharged for their protected activities");

B. The Court Of Appeals' Ruling Requiring a Statute To Specifically Authorize Representative Claims Calls Into Question The Viability Of Rule 23 To Vindicate Statutory Rights In Other Low Dollar Amount Claims

Very few Kentucky statutes specifically authorize representative group litigation. The only two statutes that specifically authorize collective litigation both predate Kentucky's modern class action rule. KRS § 337.427(2) and KRS § 341.460(2). Since the adoption of the modern class action rule, the legislature has not deemed it necessary to add specific language to any statutorily created cause of action authorizing collective or class litigation.

If the Court of Appeal's opinion is allowed to stand, its reasoning could be applied to any statutory claim. An appropriate and necessary vehicle for vindicating real wrongs that occur on a widespread basis where the harm is spread over a large number of individuals would be eviscerated in Kentucky.

C. The KWHA Provides Important Protections Left Unaddressed by the FLSA Which are Unlikely To Be Enforced Absent Rule 23

As discussed at length above, the Kentucky legislature did not include the FLSA language barring class actions or the language creating the alternative "collective action" form of group litigation. That being the case, if Kentucky's general class action rules are held inapplicable to the Wage and Hour Act, there is no alternative set of rules allowing for efficient collective enforcement of employee wage rights. Kentucky employees would be left with individual Labor Cabinet complaints, small individual civil enforcement actions in court, or, where a federally protected right is also at issue, an FLSA collective action. None of these alternatives comport with the purpose and intent of the KWHA.

Section 218(a) of the FLSA states that '[n]o provision of this chapter or any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing . . . a maximum workweek lower than the maximum workweek established under this chapter.'[8] Courts have recognized that states may elect to provide both substantive and procedural advantages to employees under their wage-and-hour laws greater than those provided by the FLSA.[9] The Kentucky legislature chose to maintain its "traditional police power" in establishing labor standards by enacting and repeatedly amending the KWHA.[10] The KWHA- by incorporating a number of FLSA provisions- provides many parallel protections to wage earnings. However, our legislature did not stop there. It also provided additional protections to employees not available under the FLSA.

Kentucky lawmakers have provided Kentucky workers numerous rights not recognized under Federal law. Unlike the FLSA, the KWHA recognizes a right of action for all wage earners who have had wages improperly deducted or have not been paid all wages due. KRS § 337.385. In contrast, the FLSA is far more limiting, only creating a

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[8] 29 U.S.C. § 218(a).

[9] *Cf. Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1424 (9th Cir. 1990), [**20] cert. denied, 504 U.S. 979, 112 S. Ct. 2956, 119 L. Ed. 2d 578; 504 U.S. 979, 112 S. Ct. 2956, 119 L. Ed. 2d 578 (1992) ("California's more protective overtime provisions are compatible with, rather than conflict with, the [FLSA]."; *Pettis Moving Co. v. Roberts*, 784 F.2d 439, 441 (2d Cir. 1986) ("Section 218(a) of the FLSA explicitly permits states to set more stringent overtime provisions than the FLSA." (internal citation omitted); *Hasken v. City of Louisville*, 173 F. Supp. 2d 654, 663-64 (W.D. Ky. 2001)("the F.L.S.A. provides basic protection in the area of wage and hour regulation which states may supplement with statutes and which parties may supplement with written contracts").

[10] *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987) ("[P]reemption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State."); *Rogers v. City of Richmond*, 851 F. Supp. 2d 983, 985 (E.D. Va. 2012).

cause of action if the specific rules result in the employee being paid less than the federal minimum wage or not being paid time and half for overtime.[11]

In addition to providing a general right of action for failure to pay wages, the KWHA grants several rights and prohibits several employer practices not addressed under the FLSA. For instance, Kentucky employers are required to provide meal breaks. There is no corresponding federal right. See U.S. Dept. of Labor Wage and Hour Division, Handy Reference Guide to the Fair Labor Standards Act 1 (WH Publication 1282 rev.'d January 16, 2016, available at http://www.dol.gov/whd/regs/compliance/wh1282.pdf). Under KRS § 337.355, a lunch break must be provided between three and five hours into a workers shift. Similarly, the KWHA expresses the Kentucky legislatures' policy that additional breaks should be provided to employees during the workday. KRS § 337.365 requires employees be provided a ten minutes break at least every four hours. Such important and reasonable rights can only be enforced through our Commonwealth's Wage and Hour Act.

In addition to granting additional rights, the Kentucky Wage and Hour Act prohibits certain practices that are not addressed by federal law. Kentucky law prohibits employers from requiring employees in the service industry to pool the tips the employees collect. KRS 337.065. Federal law does not prohibit the practice, allowing employers to mandate that employees receiving better tips for the services they provide disgorge a portion of their earnings. See *Kilgore v. Outback Steakhouse of Fla., Inc.*, 160

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[11] "Kentucky's requirement that an employer pay all wages agreed upon" has no federal counterpart. Practical effect is to create a cause of action for breach of the contract to pay wages and make attorney fees and other relief available. KRS 337.060(1) see also David Leightty, *Kentucky Employment and Labor Law*, 7.3 (2009).

F.3d 294, 303-04 (6th Cir. 1998). Further, the Kentucky Wage and Hour Act prohibits employers from engaging in the practice of reducing their wage liability to employees through a series of deductions from the employees' checks. Kentucky provides important protections to employees' hard-earned wage dollars. KRS § 337.060(2) specifically makes it unlawful for employers to deduct fines, cash register shortages, breakage, or losses due to return items (such as customer returns for workmanship issues) from an employee' paycheck. Finally, the general provisions of KRS § 337.060(1) prohibiting unauthorized deductions from paychecks discourages employers from attempting to creatively reduce its payroll liability with unauthorized deductions.

IV. THE COURT OF APPEALS' DECISION REJECTS DECADES OF WELL-REASONED AND UNIFORM PRECEDENT FROM OTHER JURISDICTIONS

The availability of class action relief under statutes with language similar to KRS § 337.385 is a new issue in Kentucky, but this Court is not left without substantial guidance. Over thirty years ago, *Califano v. Yamasaki*, 442 U.S. 682 (1979) squarely addressed this issue. The *Califano* Court announced a rule requiring a direct expression of legislative intent in order to preclude the general availability of class actions. This rule has been followed by courts across the country. In *Califano*, the U.S. Supreme Court attempted to harmonize FRCP 23 with 42 U.S.C. § 405(g), otherwise known as § 205(g) of the Social Security Act ("§ 205(g)"). *Id.* at 684. Like here, the defendant/petitioner argued that the language "any individual" and "final decisions . . . to which the plaintiff was a party" within § 205(g) exhibited the legislature's intent to negate class action availability. *Id.* at 699. The petitioner argued that the statute's legislative history supported the preclusion of class actions and that case precedent, which had previously

allowed class actions under the statute, gave "insufficient respect [to] the statute's plain language." *Id.* Petitioner argued that § 205(g) therefore intended to preclude class actions. *Id.* Despite petitioner's substantial evidence, the Court did "not find… the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure." *Id.* at 700. The *Califano* Court stated, "In the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose, class relief is appropriate in civil actions . . ." *Id.* (emphasis added).

> The fact that the statute speaks in terms of an action brought by "any individual" or that it contemplates case-by-case adjudication does not indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action otherwise is permissible. Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them . . . It is not unusual that § 205(g), like these other jurisdictional statutes, speaks in terms of an individual plaintiff, since the Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.
>
> Moreover, class relief is consistent with the need for case-by-case adjudication emphasized by the [petitioner], at least so long as the membership of the class is limited to those who meet the requirements of § 205 (g). Where the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding.
>
> Finally, we note that class relief for claims such as those presented by respondents in this case is peculiarly appropriate. The issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class . . . It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue. And the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every . . . beneficiary to be litigated in an

economical fashion under Rule 23.

Id. at 700-01.

In short, the rule of construction announced in *Califano* is this: unless a statute clearly and unambiguously precludes class actions, they are available under Rule 23.

Over thirty-five years after *Califano* was decided, the rule it announced is followed when courts are faced with an alleged conflict between modern class action rules and legislative language. Less than a year ago, *Califano* was cited by a Federal District Court in Massachusetts interpreting New Hampshire's Wage Statute. *Garcia v. E.J. Amusements of N.H., Inc.*, 98 F. Supp. 3d 277 (D. Mass. 2015). As here, the New Hampshire statute authorizing private actions for wage violations does not contain "similarly situated" or class action language. The employer argued that the omission of collective or class action language should be interpreted as "a bar on class certification of wage claims." Judge Saris had no difficulty in recognizing that the absence of language mentioning class action suits fell well short of the direct expression of intent to depart from the general rule that class actions are permitted upon a proper showing of Rule 23 "necessity and convenience". Citing *Califano,* the Court held that the New Hampshire legislature did not bar class treatment for wage and hour claims by failing to include the FLSA's "similarly situated" language.

Courts around the country have adopted the doctrine announced in *Califano* when faced with the question of reconciling statutes with language allegedly inconsistent with Rule 23. See *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577, 583-84 (Mo. Ct. App. 2010); *Grazia v. S.C. State Plastering, LLC*, 703 S.E.2d 197 (S.C. 2010); *Mussallem v. Diners' Club, Inc.*, 230 N.W.2d 717 (Wis. 1975) (pre-

Califano but applying similar rules of construction); see also, *In re Chateaugay Corp.*, 104 B.R. 626, 633 (S.D.N.Y. 1989) (using *Califano* to show that "the terms 'creditor' or 'indenture trustee' in Bankruptcy Code § 501(a) does not bar class proofs of claim any more than the use of the word 'individual' in § 405(g) bars class action review of administrative decisions under the Social Security Act."); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Communs., L.P.*, 329 F. Supp. 2d 789, 803 (M.D. La. 2004) (holding that the Telephone Consumer Protection Act and Louisiana's Unsolicited Telefacsimile Messages Act lacked clear expression of intent to preclude class actions).

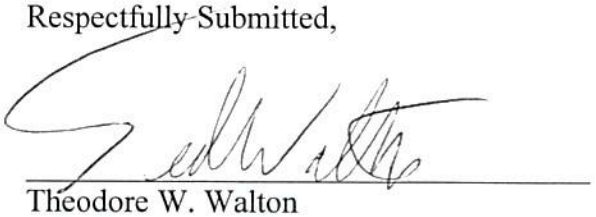
Kentucky should adopt the well-established and well-reasoned rule announced in *Califano* and followed by other jurisdictions. *Garcia*, 98 F. Supp. 3d 277. Kentucky should avoid rules of construction that infer legislative intent that trump the Rules of Civil Procedure governing our Courts. If the *Califano* rule is applied, it is beyond cavil that KRS § 337.385 lacks the required direct expression of intent necessary to preclude the availability of a class action to Plaintiffs. Without such a direct expression, KRS § 337.385 cannot be said to have modified the general availability of class actions which parties enjoy in all civil cases.

CONCLUSION

The implications of this case are far- reaching. If the Court of Appeals decision is allowed, judicial review of small wage claims will become more difficult, less-efficient, and significantly more costly. The absence of a class action vehicle will make it particularly difficult to enforce the portions of the Kentucky Wage and Hour Act that provides protection not covered by the FLSA. The Court of Appeals result is inconsistent with the history of the class action vehicle as an efficient means of resolving wage

disputes. Finally, the Court of Appeal's reasoning is incompatible with the well-reasoned analysis of other courts- including the United States Supreme Court- when addressing potential conflicts between statutory language and Rule 23 class actions.

Respectfully Submitted,



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